In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 851

SIDNEY J. GEFEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 51–58) are not reported. The opinion of the court of appeals (Pet. App. 4–16) is reported at 400 F. 2d 476.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1968. (Pet. App. 17.) The petition for rehearing was denied on September 24, 1968. (Pet. App. 18.) The petition for a writ of certiorari was filed on December 18, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

338-451—69

QUESTION PRESENTED

Whether, in a civil action commenced by the United States to enforce a federal tax lien and to obtain a deficiency judgment against a taxpayer, the taxpayer is entitled to a jury trial with respect to his tax liability.

STATEMENT

The United States instituted this action under Sections 7402 and 7403 of the Internal Revenue Code of 1954, based upon an assessment against petitioner of a 100 percent penalty for failing to pay over certain withholding and F.I.C.A. taxes on behalf of Georgia Shipbuilding Corporation (Code Sections 6671(b) and 6672). The action sought to enforce the federal tax lien against taxpayer's property for payment of the penalty (Code Section 6321) and to obtain a deficiency judgment against him for the amount of the penalty in excess of the value of the lien.

Before the district court, the petitioner made demand for a jury, which was denied by that court (R. 16). Upon a trial of the substantive issues, the trial court held that petitioner was liable for the penalty imposed by Section 6672 as a responsible corporate officer who willfully failed to pay over the taxes. Accordingly, the court foreclosed the federal tax lien on petitioner's property (the cash surrender value of a life insurance policy on petitioner's life) and entered a deficiency judgment.[1] Petitioner ap-

[1] Petitioner's wife, Lois Gefen, was a party to the proceedings below only because she was beneficiary of the life insurance policy which the government sought to reach. She is not a party here, and the deficiency judgment was against petitioner alone.

pealed from both the denial of a jury trial and the determination of liability. The court of appeals affirmed with respect to both issues (Pet. App. 6). Petitioner seeks review by this Court only in respect of the denial of his request for a jury tral.

ARGUMENT

1. The decision of the court of appeals, that a taxpayer has no right to a jury trial in an action to foreclose a federal tax lien, is clearly correct and presents no issue warranting plenary consideration by this Court. The court below expressly based its decision upon that of the Court of Appeals for the Second Circuit in *Damsky* v. *Zavatt,* 289 F. 2d 46, and it conflicts in no way with any decision of any other court of appeals.[2]

This Court has stated unequivocally that

> * * * It is within the undoubted power of Congress to provide any reasonable system for the collection of taxes and the recovery of them when illegal, without a jury trial—if only the

[2] Although a majority of the court in *Damsky* held that there was a right to jury trial as to the purely personal claim against one of the taxpayers there (Bernard Damsky), it held that the taxpayer against whom both lien enforcement and a deficiency judgment were sought (Ollie Damsky) had no jury right. Petitioner thus clearly errs in analogizing his situation to that of Bernard Damsky; clearly, his jury claim is identical to that of Ollie Damsky, which the Second Circuit rejected. Petitioner's contention that there is a conflict with *United States* v. *Strebler*, 313 F. 2d 402 (C.A. 8), is also erroneous. That case was a simple collection proceeding, not one for foreclosure of a tax lien, and there was no issue presented, or passed upon by the court, with respect to taxpayer's right to a jury.

> injunction against the taking of property without due process of law in the method of collection and protection of the taxpayer is satisfied. * * * [*Wickwire* v. *Reinecke*, 275 U.S. 101, 105–106.]

In reliance upon this principle, reiterated in *Phillips* v. *Commissioner*, 283 U.S. 589, 599 n. 9, Circuit Judge Clark's partial dissent in *Damsky* would properly have denied the jury claims made by all of the individuals involved in that case, including that of the taxpayer against whom only a claim for money judgment—not involving any lien on property in which he had an interest—was made. Judge Friendly's scholarly opinion for the majority found it unnecessary to decide this general constitutional question because it found that that particular taxpayer—and only he—had an implicit jury right by statute. But the majority did hold that there was no constitutional right to a jury trial for the taxpayer against whom—as against petitioner here—the claim was for foreclosure of a property lien and for a deficiency judgment. That claim was wholly equitable, like a suit for foreclosure of a mortgage, and moreover there was not statutory basis for requiring a jury. 289 F. 2d at 52–56. Thus, even if there were a constitutional or statutory right to a jury trial in some tax collection cases, petitioner's case is clearly not one of those cases.

The holding below is in no way inconsistent with this Court's statements with respect to the Seventh Amendment in *Beacon Theatres* v. *Westover*, 359 U.S. 500, and *Dairy Queen* v. *Wood*, 369 U.S. 469. Evidently, the principles of those cases do not apply

in the light of the general principle that there is no constitutional right to jury in federal tax litigation. And even if there were a constitutional jury right in tax collection suits that might be said to be analogous to traditional actions at law (a right which no court has, to our knowledge, asserted to exist), there is nothing in *Beacon Theatres* or *Dairy Queen* that would give such a right in a case like the present one. Those cases involved joinder in a single action of equitable claims with claims of a traditional legal character, and this Court held that such joinder should not impair the right to jury trial on the legal claims. The present case, on the other hand, is purely and simply a traditional equitable foreclosure action, in which liability on the underlying obligation is necessarily determined and a deficiency judgment may be decreed under the long-established "cleanup" doctrine. *Damsky* v. *Zavatt, supra,* 289 F. 2d at 54–55.

2. The issue presented by petitioner is of limited importance in the administration of the federal tax laws. This case involved foreclosure of the federal lien against the cash surrender value of petitioner's life insurance, a situation that is unlikely to arise again because Section 6332 of the Internal Revenue Code was amended in 1966 to permit direct levy against such an asset without need for judicial proceedings (80 Stat. 1135). In general, federal tax lien foreclosure actions (and federal tax collection actions in general) are comparatively unimportant because of the availability of such procedures that do not require the tax authorities to sue in collection matters (Code Sections 6331–6343).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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